Lee Chee Keong v Fadason Holdings Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-188–01 OF 2016, W-02(NCVC)(W)-189–01 OF 2016, W-02(NCVC)(W)-190–01 OF 2016 AND W-02(NCVC)(W)-191–01 OF 2016

ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA

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Civil Procedure — Appeal — Evidence, evaluation of — Whether trial judge's misapprehension of facts and failure to consider totality of evidence led to perverse verdict — Appellants who paid cash to buy houses sued housing developer to transfer properties into their names — Whether appellants entitled to rely on written acknowledgements of developer's former managing director ('MD') that they fully paid the purchase price — Whether trial court should not have required further corroborative evidence from appellants — Whether fact respondent had no record of sale and purchase agreements ('SPAs') nor received any purchase price from appellants not appellants' concern — Whether circumstances of case did not require appellants to have made further inquiries regarding SPAs

Evidence — Documentary evidence — Admissibility of — Appellants relied upon letters written by housing developer's former managing director ('MD') to prove they fully paid purchase price — Developer objected to admissibility of letters on ground former MD as maker not called to testify — Former MD untraceable — Letters made in ordinary course of developer's business — Whether letters properly admitted into evidence pursuant to ss 32(1)(b) and 73A(1)(a)(i) of the Evidence Act 1950 — Whether trial court's reason to hold letters had little or no probative value erroneous — Whether developer's inconsistent conduct in circumstances of case undermined integrity of its defence

The respondent in the four appeals herein had developed a housing project on land belonging to Kuala Lumpur City Hall ('DBKL'). All the appellants were buyers of houses in the project. Except for the house bought by the appellant Lee Chee Keong, which was priced at RM823,000, the three other houses bought by the other appellants were priced at RM679,462 each. The appellants signed tripartite sale and purchase agreements ('SPAs') with the respondent and DBKL for the purchases. The respondent's then managing director, Lee Chee Thing ('Lee'), signed the SPAs on the respondent's behalf. The appellants claimed they paid the purchase price of the houses in full and in cash after accepting Lee's offer of a 10% discount off the original prices of the houses if cash payment was made. They said they raised the monies from their own

savings and from borrowings and paid the purchase prices to Lee at the respondent's office after which Lee issued them and their solicitors letters ('the Lee letters'), bearing the respondent's letterhead and his signature, acknowledging the payments, confirming that the keys to the houses had been handed over to them, and also confirming the fulfillment of certain undertakings. Under the SPAs, the respondent had to obtain the issue of separate documents of title to the properties and have the properties transferred to the appellants. This was not done. Instead, the respondent terminated all the SPAs. In four separate suits, the appellants sued the respondent, inter alia, for specific performance of the SPAs. The respondent disputed the claims, raised a counterclaim alleging fraud and conspiracy between the appellants and Lee (who by then had been dismissed from the respondent's employment) to defraud the respondent. The respondent sought an order for the return of the houses. The fraud and conspiracy allegation was based on the contention the respondent did not have any record of the SPAs nor received any purchase price from the appellants. The respondent contended that whatever Lee had done vis a vis the appellants and the houses in question were done without the respondent's knowledge and authorisation. Following a trial of the suits, the High Court found both the appellants' claims and the respondent's counterclaim for fraud and conspiracy unproven and dismissed them both, but ordered the properties to be returned to the respondent. The trial court held that since the appellants failed to prove they had fully paid the purchase price for the houses, they were not entitled to an order of specific performance. The court ruled the appellants could not solely rely on the Lee letters to claim they had fully paid the purchase price because those letters were signed by Lee as an alleged co-conspirator to defraud the respondent; accordingly, the letters had little or no probative value. The trial court held that the appellants should have tendered other independent evidence to show how they had raised the purchase price monies and to show payment had been made to Lee. In this regard, the court found there was no documentary evidence to show monies had been withdrawn from bank accounts; none of the appellants' friends, relatives or family members from whom they had allegedly taken loans were called to testify and there was also no evidence of repayments of loans. The trial court also ruled that the appellants could not rely on the principle of ostensible authority or the rule in *Turquand*'s case to show that Lee's actions bound the respondent because the circumstances of the case, especially the requirement for cash payment, were unusual and the appellants should have made further inquiries to ascertain the veracity and propriety of the whole deal. Since they failed to make such inquiries, Lee's actions in accepting payment and issuing receipts could not operate to bind the respondent. The trial court ruled that the properties had to be returned to the respondent as a 'natural consequence' of the finding that the appellants had no right to their possession. The appellants appealed against the High Court's decision. There was no appeal or cross-appeal by the respondent.

Held, allowing the appeals and setting aside the decisions of the High Court: A

(1) There was no basis for the trial court to have rejected the oral evidence of the appellants that they had fully paid the purchase price in cash and to have insisted on corroborative evidence. There was no suggestion the appellants were not capable of financing the purchases. The appellants had testified in detail as to how the total sums were raised. The totality of the evidence, both oral and documentary, overwhelmingly established the appellants' claims (see paras 49, 52 & 80). B

(2) The trial court erred in finding that the Lee letters were of limited evidentiary value. When the trial court found the respondent's defence of conspiracy and fraud not proven, there was no issue of Lee being the co-conspirator anymore to weigh against any reliance on his letters. The appellants were entitled to rely on the Lee letters as evidence of their claim and the trial court ought to have examined the contents of those letters and evaluated them against any other evidence before the court. Had the trial court done that, it would have found that the appellants' claims were consistent and satisfactorily proven on balance of probabilities (see para 60). C D

(3) The truth and authenticity of the contents of the SPAs were never challenged. The SPAs were genuine agreements to sell the properties to the appellants. What was disputed was simply the matter of payments. The respondent could not trace any of the appellants' payments in its records and for that reason claimed the appellants had conspired with Lee to defraud it. The trial judge's finding that the SPAs were unenforceable was erroneous (see paras 73–74). E F

(4) The appellants were entitled to rely on Lee's real and ostensible authority as managing director of the respondent as the SPAs were valid and enforceable. There was nothing to put the appellants on inquiry in the circumstances of the case such that they could not rely on Lee's representations and the letters he wrote. The SPAs were normal transactions ordinarily entered into in the course of the respondent's business. The appeal records did not show any contention that Lee had insisted on cash payments. The payment in cash was to allow for a discount. The appellants testified that they did not find such an offer unusual. There was no evidence from the respondent to suggest the discounted prices in the SPAs were wrong or that discounts were never given in the industry. In the absence of any evidence to the contrary, the appellants' contention that Lee had offered them a discount stood. The trial court should not have disbelieved the appellants' claim of payment in cash terms (see paras 48, 63 & 72–73). G H I

(5) The respondent's conduct after it learnt of Lee's misdeeds was relevant and material to the integrity of its pleaded defence. It dismissed Lee in

2007 but only got round to lodging police reports against him some two years later. As for the SPAs, the respondent only got round to terminating them in July 2009 and did not lodge further police reports concerning the payments made by the appellants until a year later. Thereafter, the respondent did nothing towards recovering the properties until the appellants filed their respective claims in September 2012. It was only at that point that the respondent counterclaimed for a return of the properties — which the appellants had been in possession/occupation of since 2006 — or for payments of the purchase prices under the SPAs. The appeal records show that as late as 2009, the respondent was corresponding with the appellants' solicitors on the matter of the issue of title (see paras 50, 76 & 79).

(6) The trial court erred in ordering the properties to be returned to the respondent. The SPAs were tripartite agreements with DBKL as the owner of the lands on which the properties stood. The authenticity and authorisation of the signatories signing on behalf of DBKL was never an issue. The issue was one of performance and completion of the SPAs and not their validity. Accordingly, when it dismissed the claims and counterclaim, what the trial court ought to have done was order the payment of the purchase prices to the respondent, as prayed for by the latter, given that the appellants had been in occupation of their respective properties since the time of their purchases during which time defects had been identified and attended to by the respondent (see para 78).

[Bahasa Malaysia summary

Responden dalam empat rayuan ini telah membangunkan satu projek perumahan di atas tanah kepunyaan Dewan Bandaraya Kuala Lumpur ('DBKL'). Kesemua perayu adalah pembeli rumah-rumah dalam projek itu. Kecuali rumah yang dibeli oleh perayu Lee Chee Keong yang berharga RM823,000, tiga buah rumah lain yang dibeli oleh perayu-perayu lain berharga RM679,462 setiap satu. Perayu menandatangani perjanjian jual beli ('PJB') tiga pihak dengan responden dan DBKL untuk belian itu. Pengarah urusan responden pada ketika itu, Lee Ching Thing ('Lee'), menandatangani PJB bagi pihak responden. Perayu-perayu mendakwa bahawa mereka telah membayar harga belian rumah sepenuhnya secara tunai selepas menerima tawaran Lee sebanyak 10% diskaun daripada harga asal rumah jika bayaran tunai dibuat. Mereka mengatakan bahawa mereka mengumpulkan wang daripada simpanan mereka sendiri dan daripada pinjman dan membayar harga belian kepada Lee di pejabat responden selepas itu Lee mengeluarkan surat kepada mereka dan peguamcara mereka ('surat Lee'), yang mempunyai kepala surat responden dan tandatangannya, mengakui bayaran, mengesahkan bahawa kunci rumah telah diserahkan kepada mereka, dan juga mengesahkan kepatuhan aku janji tertentu. Di bawah PJB, responden perlu memperolehi pengeluaran dokumen hakmilik berasingan hartanah dan telah

memindahmilik hartanah tersebut kepada perayu. Ini tidak dilakukan. Sebaliknya responden menamatkan kesemua PJB. Dalam empat saman berasingan, perayu menyaman responden, antara lain, untuk pelaksanaan spesifik PJB. Responden mempertikaikan tuntutan teresebut, membangkitkan tuntutan balas dengan mendakwa fraud dan konspirasi antara perayu dan Lee (yang mana pada waktu itu telah ditamatkan daripada perkhidmatannya di bawah responden) untuk melakukan fraud terhadap responden. Responden memohon satu perintah untuk pemulangan rumah. Dakwaan fraud dan konspirasi adalah berdasarkan hujahan bahawa responden tidak mempunyai apa-apa rekod PJB mahupun menerima apa-apa harga belian daripada perayu-perayu. Responden menegaskan bahawa apapun yang telah dilakukan oleh Lee *vis a vis* perayu-perayu dan rumah-rumah yang dipersoalkan adalah dilakukan tanpa pengetahuan dan kebenaran responden. Berikutan perbicaraan saman, Mahkamah Tinggi mendapati kedua-dua tuntutan perayu-perayu dan tuntutan balas responden untuk fraud dan konspirasi tidak dibuktikan dan menolak kedua-duanya, tetapi memerintahkan hartanah tersebut dipulangkan kepada responden. Mahkamah perbicaraan memutuskan bahawa memandangkan perayu-perayu gagal untuk membuktikan mereka telah membayar penuh harga belian untuk rumah-rumah tersebut, mereka tidak berhak terhadap satu perintah pelaksanaan spesifik. Mahkamah memutuskan perayu-perayu tidak boleh bergantung semata-mata pada surat Lee untuk mendakwa bahawa mereka telah membayar penuh harga belian kerana surat-surat tersebut ditandatangani oleh Lee sebagai seorang yang didakwa pengomplot untuk melakukan fraud terhadap responden, sewajarnya, surat itu mempunyai sedikit atau tiada nilai probatif. Mahkamah perbicaraan memutuskan bahawa perayu-perayu sepatutnya telah memasukkan keterangan bebas yang lain untuk menunjukkan bagaimana mereka mengumpul wang harga belian dan untuk menunjukkan bayaran kepada Lee telah dibuat. Berkenaan ini, mahkamah mendapati bahawa tiada keterangan dokumentari untuk menunjukkan bahawa wang telah dikeluarkan daripada akaun-akaun bank; tiada satu pun rakan perayu, saudara atau ahli keluarga yang mereka telah didakwa mengambil pinjaman dipanggil untuk memberi keterangan dan juga tidak terdapat keterangan pembayaran semula pinjaman. Mahkamah perbicaraan juga memutuskan bahawa perayu-perayu tidak boleh bergantung ke atas prinsip autoriti nyata atau kaedah dalam kes *Turquand* untuk menunjukkan bahawa tindakan Lee mengikat responden kerana keadaan kes, terutama keperluan untuk pembayaran tunai, adalah tidak lazim dan perayu-perayu sepatutnya membuat penyelidikan lanjut untuk menentukan kebenaran dan kewajaran keseluruhan perjanjian itu. Memandangkan mereka gagal untuk membuat penyelidikan sebegitu, tindakan Lee menerima bayaran dan mengeluarkan resit tidak boleh beroperasi untuk mengikat responden. Mahkamah perbicaraan memutuskan bahawa hartanah tersebut hendaklah dipulangkan kepada responden sebagai 'natural consequence' terhadap dapatan bahawa perayu-perayu tidak mempunyai hak terhadap milikan

A B C D E F G H I

mereka. Perayu merayu terhadap keputusan Mahkamah Tinggi. Tiada rayuan atau rayuan balas oleh responden.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Tidak terdapat asas untuk mahkamah perbicaraan menolak semua keterangan lisan perayu bahawa mereka telah membayar penuh harga belian secara tunai dan menegaskan keterangan sokongan. Tidak terdapat cadangan bahawa perayu tidak mampu untuk membiayai belian. Perayu telah memberi keterangan dengan terperinci akan bagaimana jumlah keseluruhan dikumpulkan. Keseluruhan keterangan, kedua-dua lisan dan dokumentari, membuktikan tuntutan perayu (lihat perenggan 49, 52 & 80).

(2) Mahkamah perbicaraan terkhilaf dalam mendapati bahawa surat Lee mempunyai nilai bukti yang terhad. Apabila mahkamah perbicaraan mendapati pembelaan konspirasi dan fraud responden tidak dapat dibuktikan, tiada isu Lee menjadi pekomplot bersama lagi untuk melawan terhadap apa-apa pergantungan terhadap suratnya. Perayu berhak untuk bergantung ke atas surat Lee sebagai keterangan terhadap tuntutan mereka dan mahkamah seharusnya memeriksa kandungan surat tersebut dan menilainya terhadap apa-apa keterangan lain di hadapan mahkamah. Sekiranya mahkamah perbicaraan telah berbuat demikian, ia akan mendapati bahawa tuntutan perayu-perayu telah dibuktikan atas imbangan kebarangkalian dengan konsisten dan memuaskan (lihat perenggan 60).

(3) Mahkamah perbicaraan terkhilaf dalam mendapati bahawa surat Lee mempunyai nilai bukti yang terhad. Apabila mahkamah perbicaraan mendapati pembelaan konspirasi dan fraud responden tidak dapat dibuktikan, tiada isu Lee menjadi pekomplot bersama lagi untuk melawan terhadap apa-apa pergantungan terhadap suratnya. Perayu berhak untuk bergantung ke atas surat Lee sebagai keterangan terhadap tuntutan mereka dan mahkamah seharusnya memeriksa kandungan surat tersebut dan menilainya terhadap apa-apa keterangan lain di hadapan mahkamah. Sekiranya mahkamah perbicaraan telah berbuat demikian, ia akan mendapati bahawa tuntutan perayu-perayu telah dibuktikan atas imbangan kebarangkalian dengan konsisten dan memuaskan (lihat perenggan 73–74).

(4) Perayu-perayu berhak untuk bergantung kepada autoriti Lee yang benar dan nyata sebagai pengarah urusan responden memandangkan PJB adalah sah dan boleh dilaksanakan. Tiada apa yang boleh meletakkan perayu-perayu dalam siasatan dalam keadaan kes ini sehinggakan mereka tidak boleh bergantung kepada representasi Lee dan surat yang ditulisnya. PJB adalah transaksi normal yang kebiasaannya

ditandatangani dalam perjalanan perniagaan responden. Rekod rayuan tidak menunjukkan apa-apa penegasan bahawa Lee telah berkeras untuk pembayaran tunai. Pembayaran tunai adalah untuk membolehkan diskaun. Perayu-perayu memberi keterangan bahawa mereka tidak mendapati tawaran sebegitu adalah tidak lazim. Tiada keterangan daripada responden untuk mencadangkan harga diskaun di dalam PJB adalah salah atau diskaun tidak pernah diberikan dalam industri itu. Dalam ketiadaan keterangan menunjukkan sebaliknya, hujahan perayu-perayu bahawa Lee telah menawarkan mereka diskaun terpakai. Mahkamah perbicaraan tidak sepatutnya tidak mempercayai tuntutan pembayaran secara tunai perayu-perayu (lihat perenggan 48, 63 & 72–73).

(5) Kelakuan responden setelah ia mengetahui salah laku Lee adalah relevan dan material terhadap integriti pembelaan yang diplidkan mereka. Ia menolak Lee pada tahun 2007 tetapi hanya melaporkan laporan polis terhadapnya lebih kurang dua tahun selepas itu. Berkenaan PJB, responden hanya menamatkan mereka pada Julai 2009 dan tidak membuat laporan polis selanjutnya berkaitan dengan pembayaran yang dibuat oleh perayu sehingga setahun kemudian. Selepas itu, responden tidak melakukan apa-apa untuk mendapatkan kembali hartanah sehingga perayu-perayu memfailkan tuntutan mereka masing-masing pada September 2012. Hanya pada ketika itu responden telah menuntut balas untuk pulangan terhadap hartanah — yang mana telah dimiliki/diduduki sejak 2006 — atau untuk bayaran harga belian di bawah PJB. Rekod rayuan menunjukkan bahawa selewat tahun 2009, responden telah berhubung dengan peguamcara perayu-perayu terhadap perkara pengeluaran dokumen hakmilik (lihat perenggan 50, 76 & 79).

(6) Mahkamah perbicaraan terkhilaf dalam memerintahkan hartanah untuk dipulangkan kepada responden. PJB adalah perjanjian tiga pihak dengan DBKL sebagai pemilik tanah di mana hartanah terletak. Kesahihan dan kebenaran penandatangan menandatangani bagi pihak DBKL tidak pernah menjadi isu. Isunya adalah terhadap pelaksanaan dan penyelesaian PJB dan bukan kesahihannya. Sewajarnya, apabila ia menolak tuntutan dan tuntutan balas, apa yang sepatutnya mahkamah perbicaraan lakukan adalah memerintahkan pembayaran harga belian kepada responden, seperti yang dipohon oleh yang kemudian, memandangkan bahawa perayu-perayu telah menduduki hartanah mereka masing-masing sejak waktu belian mereka, pada masa itu kecacatan masa telah dikenal pasti dan diberi perhatian oleh responden (lihat perenggan 78).]

Notes

For cases on admissibility of documentary evidence, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1489–1520.

For cases on appeal in general, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 822–2054.

Cases referred to

AL Underwood, Ltd v Bank of Liverpool and Martins; Same v Barclays Bank [1924] 1 KB 775, CA (refd)
Anderson v City of Bessemer (1985) 470 US 564, CA (refd)
Carlyle v Royal Bank of Scotland Plc [2015] UKSC 13, SC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Henderson v Foxworth Investments Limited and Another [2014] UKSC 41, SC (refd)
Kanssen v Rialto (West End) Ltd [1944] Ch 346, CA (refd)
Liew Muy Yan v Fadason Holdings Sdn Bhd Civil Suit No S-22NCVC-16 of 2011 (unreported), HC (refd)
Low Tin Yong @ Low Yong Lian v Low Yong Thuan [2016] 3 MLJ 332; [2016] 5 CLJ 217, CA (refd)
MMC Oil & Gas Engineering Sdn Bhd v Tan Boon Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)
Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2014] MLJU 1807; [2014] 9 CLJ 1064, FC (refd)
Morris v Kanssen [1946] AC 459, HL (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 32(1)(b), 73A, 73A(1)(a)(i)

Appeal from: Civil Suit Nos 22NCVC-1154–09 of 2012, 22NCVC-1155–09 of 2012, 22NCVC-1156–09 of 2012 and 22NCVC-1157–09 of 2012 (High Court, Kuala Lumpur)

HY Lee (Woon Huei Chin and Tiong Chau Siong with him) (Tiong & Woon) for the appellants.
G Gunaseelan (Ramachandran a/l Mayilalagan and Selva Rajoo with him) (Rama Samuel & Assoc) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] These four appeals arose from four suits which were retried together before the same learned judicial commissioner following a successful appeal to

the Court of Appeal by the respondent. The Court of Appeal had ordered the retrials upon finding that the approach taken by the learned judge in the first trial was erroneous. The learned judge had heard the first of four cases and had used her decision in that first decision as a test case to bind the remaining three cases. The Court of Appeal disagreed with that approach holding that each case had to be tried separately and consecutively. Hence, the retrials.

[2] The learned JC had proceeded accordingly with the trials. Each plaintiff led his/their case followed by the defendant in response to all four claims since the evidence adduced by the defendant was the same for all four cases. Insofar as the grounds of judgment are concerned, there is only one but the learned JC was careful to express that the evidence applicable to each plaintiff(s) was evaluated separately, in particular on the question of whether each plaintiff had proved his/their claim so as to entitle him/them to the remedy of specific performance. The learned JC found none of the claims proved and proceeded to dismiss all four claims. However, the counterclaims of the defendant was allowed; and the court ordered that the physical possession of the properties to be returned to the defendant. All four plaintiffs appealed. There is no appeal or cross-appeals from the respondent.

[3] Upon hearing counsel and following careful consideration of the records of appeal and the written/oral submissions of all counsel, we found merits in each appeal. We found that the learned JC had misapprehended the facts and had in effect failed to consider the totality of the evidence before him such that the decision reached was plainly wrong. We then unanimously allowed all four appeals. These are our reasons in full.

FACTS

[4] The respondent in the four appeals was the vendor and developer of a housing project in Kepong called 'Taman Fadason' developed on land held under master title HS (D) 104603 PT 19507, Mukim Batu, Daerah Kuala Lumpur ('the project'). The proprietor of the land was Datuk Bandar Kuala Lumpur ('DBKL'). The four appellants were four individuals or parties who had separately bought from the respondent, two-storey link houses located in Taman Fadason. Each appellant signed separate but substantially similar, tripartite sale and purchase agreements ('SPAs') with the respondent and DBKL for the purchase of their house. Each SPA was dated 21 April 2006. Each house was already fully constructed at the time of the SPA. The respondent's then managing director, Lee Chee Thing ('Lee'), signed all the SPAs on behalf of the respondent. DBKL had its authorised signatory sign on its behalf.

[5] The details of the four purchases are best depicted in the chart below:

Appeal No 188–01 of 2016	Appeal No 189–01 of 2016	Appeal No 190–01 of 2016	Appeal No 191–01 of 2016
Lee Chee Keong (P1)	Lim Chin Keong (P2)	Lim Wang Ling & Wong Nyok Kuin (P3)	Yong Heng Wah & Yong Chung Loong (P4)
Lot No 116	Lot 126	Lot 149	Lot 150
No 1, Jalan 8/7, Off Jalan Kepong, 52000, Kuala Lumpur	No 21, Jalan 8/7, Off Jalan Kepong, 52000, Kuala Lumpur	No 22, Jalan 8/7, Off Jalan Kepong, 52000, Kuala Lumpur	No 24, Jalan 8/7, Off Jalan Kepong, 52000, Kuala Lumpur
Purchase price: RM823,000	Purchase price: RM679,462	Purchase price: RM679,462	Purchase price: RM679,462

[6] At the material time, none of the appellants knew each other. They, however, ended up using the same firm of solicitors, Yew How & Tan, for the purpose of the SPAs. In the case of the appellant in the first appeal, Lee Chee Keong, he knew Lee Yee How, a partner of the firm while the appellant in the second appeal, Lim Chin Keong had previously used the firm for unrelated matters. The appellants in the third and fourth appeals were introduced to Lee Yee How by a property agent known as Kenneth or Kenneth Yap, since deceased. Lee Yee How testified at the trial as PW2.

[7] Each appellant testified that Lee offered each of them a 10% discount off the original purchase price of the properties if they paid the purchase price in cash. The purchase price of the properties in question ranged from RM679,462 to RM823,000. Each appellant testified that they took up the offer and they each paid the purchase price, fully and in cash. Each appellant testified that he/they raised monies from their own savings and from borrowings from friends and/or relatives. Each paid the relevant purchase price to Lee at the office of the respondent on 3 March 2006. The details of how the various appellants raise their funds have been helpfully summarised by the learned JC in a table which we reproduce below:

P1 (Purchase Price: RM823,000)	P2 (Purchase Price: RM679,462)	P3 (Purchase Price: RM684,462)	P4 (Purchase Price: RM679,462)
Savings: RM200,000 Borrowed from a Dato' Wang: RM250,000	Savings: RM400,000 Borrowed from father: RM100,000	Savings: RM250,000 Wife's savings: RM100,000	Savings: RM200,000 Borrowed from mother: RM300,000

Borrowed from mother: RM200,000	Borrowed from brother: RM180,000	Borrowed from elder sister: RM100,000	Borrowed from younger sibling: RM180,000
Borrowed from former partner: RM100,000		Borrowed from elder brother: RM100,000	
Borrowed from 'Uncle Ming': RM100,000		Borrowed from younger sister: RM80,000	
		Borrowed from another elder brother: RM50,000	

[8] Upon payment, Lee gave each of them a letter dated 3 March 2006 confirming and acknowledging the full payment of the purchase price. These letters were produced and admitted at the trial. Each appellant was then given vacant possession of the properties purchased. Each appellant also produced similarly worded letters dated 31 March 2006 that were signed by Lee confirming that the keys to the relevant properties had been given to each of the appellants. These letters were also admitted at the trial. Both letters were prepared on the respondent's letterhead. The first of the two letters were addressed to the respective appellants whilst the second letter confirming that keys had been given to the appellants were sent to their solicitors, Yew How & Tan. Then, there is a third letter from the respondent dated 31 July 2006. It is the respondent's letter of confirmation and undertakings addressed to Yew How & Tan confirming that the purchase price had been settled in full by the appellants. This letter, too, was admitted in evidence. This letter, like the earlier two letters was also written on the respondent's letterhead.

[9] Each appellant subsequently obtained loans from Hong Leong Bank Bhd. As part security for the loans, each appellant assigned their rights, title and interest in the SPAs to Hong Leong Bank. When the loans were disbursed to the appellants, each repaid either fully or in part the loans that they had obtained earlier from friends and/or relatives. Wong Guek Phong ('PW2'), a manager with Hong Leong Bank testified for all four appellants, confirming the existence and disbursements of the loans.

[10] Under the SPAs, the respondent was required to obtain the issue of separate documents of title and to see to the transfer and/or registration of the titles to the individual appellant. On 20 April 2007, individual titles were issued and/or registered to DBKL. None of the titles were transferred to any of the appellants. The appellant claimed that despite their inquiries, they never got their documents of title. On 10 July 2009, the respondent terminated all the SPAs.

[11] The appellants filed separate suits against the respondent. The appellants challenged the termination and sought specific performance of the SPAs alleging, inter alia, that the respondent had breached the terms and conditions of the SPAs when it failed to deliver the titles and instruments of transfer of the properties to the relevant appellants. The appellants claimed that they were entitled to rely on, inter alia, the SPAs and letters issued by Lee; and the fact that the respondent had rectified all the defects raised during the defects liability period as evidence of the sales contracts; and that the respondent was estopped from denying the appellants as bona fides and valid purchasers.

[12] The respondent disputed the claims and counterclaimed for, inter alia, the return of the properties. In their defence, the respondent alleged that the SPAs had been entered into fraudulently and for the purpose of defrauding the respondent. The respondent alleged that the plaintiffs had conspired with Lee, the former managing director of the respondent. The respondent claimed that when it came under a new management on 18 May 2007, its newly appointed general manager, Azmi Mat Ludin ('DW2') found that 'the aptronymic Lee Chee Thing' (described by the learned JC) had been cheating the respondent of its money. The respondent claimed that none of the SPAs involving the appellants could be traced in the respondent's records. Lee was dismissed by the respondent on 26 June 2007. The respondent made police reports against Lee and at the same time, commenced legal proceedings against him. The respondent also lodged a private caveat against the properties in question.

DECISION OF THE HIGH COURT

[13] The learned JC decided that because the appellants were seeking the equitable relief of an order for specific performance, the appellants themselves must not be in breach of the SPAs. This meant that the appellants must show that the purchase price had been paid otherwise they, themselves, would be in breach. Non-payment of the purchase price is a fundamental breach because the SPAs provided time to be of the essence.

[14] For this purpose, the appellants had relied principally on the SPAs and letters signed by Lee on behalf of the respondent as evidence of the existence of

agreements to sell the relevant properties; and as evidence of full payments of the purchase price under the SPAs. The appellants' arguments were that they were each entitled to rely on these documents by virtue of Lee's position as the managing director of the respondent at the material time, that Lee would be duly authorised to receive payment and to issue confirmation of payments on behalf of the respondent. All three letters had been signed by Lee using the respondent's letterhead.

[15] The learned JC did not think so. In dealing with the letters written by Lee, the learned JC felt that there were 'two distinct (albeit connected) issues at hand. The first was whether Lee Chee Thing had received payment from the plaintiffs, and the second is whether the plaintiffs can rightly regard payment as having been tendered to the defendant by reason that they had paid Lee Chee Thing'. According to the trial court, the 'question of Lee Chee Thing's authority to bind the defendant (whether through actual, implied or ostensible authority or through the presumption of regularity arising from *Turquand*'s case) only affects the second issue'. It was the learned JC's view that the appellants still had to show that payment had in fact been made. The learned JC was of the opinion that '… the evidentiary value of the 3 March 2006 letters would necessarily be limited, since they were letters that had been produced by Lee Chee Thing'; that insofar as the 30 July 2006 letters were concerned, '… like the 3 March 2006 letters, the evidentiary value of these letters are also limited, as it was signed by the person against whom the defendant alleged fraud'. The learned JC thereby adjudged that Lee's letters, especially those dated 3 March 2006, were in themselves insufficient for the purpose of showing that the appellants had in fact paid.

[16] With this, the learned JC was not satisfied that each appellant had proved, on a balance of probabilities, that the respective purchase prices of the SPAs had indeed, been paid. The appellants had testified as to how each of them had raised the purchase price (see earlier chart for details). The learned JC found P1's answers 'disingenuous and self-contradicting', P4's answers inherently contradictory; that the appellants' full payments in hard cash demonstrated 'a cavalier lack of caution on their part'; and further found that there was no independent documentary evidence to corroborate the payments. In his judgment, the learned JC expressed the view that corroborative evidence still had to be adduced, whether in the form of bank statements or other documentary evidence to show the sources from which the appellants raised the purchase price. Put simply, the learned JC did not believe any of the appellants, that they had paid the purchase price in full and in cash. So, corroborative evidence was required. Because none was produced, and because the appellants could not show that they had paid the purchase price, the learned JC found them to be in breach of the SPAs and therefore not entitled

to the orders of specific performance. Accordingly, all four claims were dismissed.

[17] On the application or otherwise of the rule in *Turquand*'s case and the question of ostensible authority, the learned JC found that the appellants were not entitled to rely on either argument. According to the learned JC, the indoor management rule was not available to the appellant as the circumstances presented had put the appellants on inquiry and the appellants had failed to make such further inquiries as would be reasonable. On the question of ostensible authority, the trial court also found this to be not applicable. The court found that while it would not have been entirely unusual for property purchases to be funded from retained earnings or savings, 'it was unusual for a developer to insist on payment being made in physical notes'. It was the trial court's judgment that when Lee asked for payment to be made in physical notes, that put each appellant on a duty to make further inquiries. When each appellant failed to do so, any representation giving rise to any ostensible authority on the part of Lee to bind the respondent was, vitiated. The appellants' failure to make further inquiries meant that the acts of Lee in accepting payment and issuing receipts would not operate to bind the respondent as principal.

[18] With the above findings, the learned JC found the issue of the effectiveness of the respondent's letters of termination no longer relevant, explaining it in the following terms:

> As the SPAs are unenforceable against the defendant, it does not matter whether the agreements had been effectively terminated by the 10 July 2009 letter. In any event, on the facts, I find that the defendant has not satisfied me that there was an effective notice of the purported termination.

[19] As for the respondent's counterclaim premised on the allegation of fraud and conspiracy, the learned JC found that the respondent had not proved its case against the appellants. The High Court held that the respondent had failed to prove:

(a) that each appellant had committed fraud; and

(b) that each of them had conspired with Lee to defraud the respondent.

[20] The respondent's case 'pivoted upon the fact that it did not have any record of any of the SPAs nor of any payment being made by the plaintiffs to the defendant'. According to the learned JC, 'the absence of such records cannot amount to proof of fraud, even bearing in mind that the standard of proof needed to be discharged for fraud in civil cases is on a balance of probabilities ...'. This was the civil burden of probabilities. The trial court found that although the plaintiff had failed to show that payments had been

made, it 'does not necessarily follow that the plaintiffs had knowingly assisted and colluded to cheat the defendant and to secure the relevant properties in an unlawful manner.' It was the finding of the learned JC that the 'existence of such an understanding between Lee Chee Thing and each of the plaintiffs for payment to be made in cash and for an acknowledgment of payment to be given by the former as a record of payment of the purchase price ... cannot amount to proof that the plaintiffs had colluded with Lee Chee Thing to cheat or defraud the defendant'. Consequently, the counterclaims were dismissed.

[21] Despite these decisions, the court ordered the return of the properties to the respondent taking the view that the reliefs sought by the respondent were not dependent on the case of proven fraud. Rather, the return of the properties 'follows a natural consequence of the dismissal of the plaintiff's actions that none of them have any right to possession of the subject properties ...'. The court further ordered the appellants to pay costs of RM20,000 each to the respondent.

DECISION OF THIS COURT

[22] Before us, learned counsel for the appellants took these three principal submissions:

(a) that the learned JC erred in concluding that the appellants had not proved their claims;

(b) that the learned JC erred in finding that the evidential value of the letters issued by the respondent would necessarily be limited; and

(c) that the learned JC erred in finding that the appellants cannot rely on the *Turquand*'s rule and the law on ostensible authority.

[23] It is evident that the first two issues concern substantially findings of fact by the trial court. In this regard, we are always mindful that as a court sitting in appeal, we do not share the same advantage as the trial court who has had the benefit of audio-visual display of the evidence and assessing the demeanour of the witnesses, should those matters become critical and relevant when determining credibility and veracity of evidence issues. As such, this court should never intervene just because it does not agree with the finding or would have come to a different conclusion had it been sitting at first instance. To do that will wreak havoc to the administration of justice as we have long understood it. Intervention should be where the decision reached is plainly wrong and unsustainable by the strong evidence adduced at trial or where the decision is not one that would reasonably have been arrived at giving rise then to a miscarriage of justice. When that happens, the appeal court must intervene to prevent that error from causing injustice.

[24] This test of intervention only where the decision of first instance is 'plainly wrong' has been repeatedly reminded by the apex court. We cite three such decisions. First, in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, Steve Shim CJ (Sabah and Sarawak) said:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.
>
> ... A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

[25] Subsequently, in the Federal Court's decision in *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] MLJU 1807; [2014] 9 CLJ 1064, Raus Sharif PCA too, succinctly set out the powers of the appellate court:

> [45] It is trite law that an appellate court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary duty of evaluation of the evidence. However, the appellate court is under a duty to intervene in a case where the trial court has so fundamentally misdirected itself. In our judgment, we find that there was insufficient judicial appreciation by the learned trial judge of the pleadings and contemporaneous evidence in the instant case when she allowed Merita's claim. Such erroneous finding warranted appellate interference which the Court of Appeal rightfully done so, and we have no reason to disagree ...

[26] In a more recent decision of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, the Federal Court once again reiterated that an appellate court should only intervene to reverse findings of fact by the trial court on a 'plainly wrong test':

> ... It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 10; [2004] 4 CLJ 309 at p 319 per Steve Shim CJ (Sabah and Sarawak). More recently this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal* [2010] MLJU 2179; [2010] 9 CLJ 785 where it was held at p 800:
>
> It is well-settled law that an appellate court will not generally speaking, intervene

with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt (Or Thomas) v Thomas* [1947] 1 All ER 582; [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309).

[27] The Court of Appeal in two recent decisions of *MMC Oil & Gas Engineering Sdn Bhd v Tan Boon Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665 and *Low Tin Yong @ Low Yong Lian v Low Yong Thuan* [2016] 3 MLJ 332; [2016] 5 CLJ 217, also took the opportunity to examine a long line of authorities from the UK including the three decisions of the Federal Court cited above. Both decisions are timely reminders of the exercise of the power of appellate intervention. In the first of the two decisions, *MMC Oil & Gas Engineering Sdn Bhd v Tan Boon Kwee & Sons Sdn Bhd,* Nallini Pathmanathan JCA explained why it was important that a court sitting on appeal should only set aside a finding of fact or conclusion reached by the court below in limited circumstances. At para 5, Her Ladyship quotes the famous dicta of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 on this point:

(1) Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, *should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.* (2) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in the position to come to any satisfactory conclusion on the printed evidence. (3) The appellate Court, may either because the reasons given by the trial judge are not satisfactorily, or because it unmistakably so appears from the evidence, *may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate Court*. (Emphasis added.)

[28] It was the view of the Court of Appeal that it would only be in the 'rarest of occasions and where the appellate court is convinced by the plainest of considerations that it would be justified in finding that the trial judge had come to an erroneous conclusion on the evidence before him'. The Court of Appeal also subscribed to the view expressed in *Anderson v City of Bessemer* (1985) 470 US 564 at pp 574–575 by the US Supreme Court where it, inter alia, concluded that '... review of factual findings under the clearly erroneous standard — with its deference to the trier of fact — is the rule, not the exception'.

[29] In the same decision, Her Ladyship further examined the term 'plainly wrong' and explained that:

A [14] The requirement for the trial judge to have come to a finding which was 'plainly wrong' before an appellate court may intervene is therefore well entrenched in our appellate philosophy and practice. In *Henderson v Foxworth Investments Ltd and another* Lord Reed considered the meaning to be accorded to the phrase 'plainly wrong':

B

> ... here may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. *The adverb 'plainly' does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.*

C

[15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the

D conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.

E

[16] There is, however, little room for variation in the application of the principle of intervention when the trial judge is 'plainly wrong'. Appellate courts ought to be consistent in ensuring that appellate intervention only comes about when a trial judge reaches a conclusion which no reasonable judge could have reached. A lack of

F such consistency in approach would give rise to considerable uncertainty in the practice and progress of litigation. Litigants through their counsel should be able to assess with some degree of certainty, on clear and distinctly applied principles of law, whether a judgment obtained at first instance is likely to be overturned or not. This is only possible if there is a consistent application of the 'plainly wrong' principle underlying appellate intervention.

G

[17] The obverse or counterpart to the requirement for appellate restraint in dealing with findings of fact by the trial judge is the fundamental requirement that the judgment of first instance does in fact amount to a comprehensive and cohesive determination of the material matters comprising the subject matter of dispute before the trial judge. This requires the trial judge to undertake a full evaluation of

H the evidence and issues placed before the court. A first instance judgment is open to challenge when it fails to address or wholly ignores material evidence or issues placed before it, or when bald findings of fact are made with no reasoning or evidence to substantiate such findings. Equally errors of law, a clear misunderstanding of relevant evidence and such clearly identifiable errors will all

I contribute towards a decision that would be considered to be 'plainly wrong'.

[30] This limited, rare and restrained exercise of intervention is substantially due to the fact that these two tiers of the judicial system, the trial court and the appellate court, have different primary functions. If the appellate court was to

require parties to go through the whole process of persuading the appellate panel the very questions of fact that were determined in the trial court, it would 'expose parties to great costs and divert judicial resources for what would often be negligible benefit in terms of factual accuracy' not to mention that the perception of the appellate court may be somewhat 'narrowed or even distorted by the focused challenge to particular parts of the evidence' — see *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13. When considering whether to intervene, the appellate court must be convinced that the error committed by the trial vourt is material, or that there is a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence in which case the decision cannot reasonably be explained or justified, as expressed by the UK Supreme Court in *Henderson v Foxworth Investments Limited and Another* [2014] UKSC 41. In other words, the Court of Appeal must be satisfied that the findings or conclusions literally fly in the face of incontrovertible facts or undisputed evidence leaving the decision arrived at as highly improbable or contrary to reasonable inferences which may be drawn from such evidence.

[31] Justice Nallini set about the same reminders in the second of the two decisions, in *Low Tin Yong @ Low Yong Lian v Low Yong Thuan* at paras 45–46 before the court decided that in the instant appeal:

> [47] This however was a case where we were satisfied that the findings of the learned trial judge, with respect, were clearly erroneous. While there was some evidence to support the finding of a trust by the trial judge, a consideration of the entire evidence on the record left us with the definite and firm conviction that a mistake had been committed. It bears repeating that we remained cognizant that generally speaking, when a conclusion or result is dependent upon the candor and credibility of the witnesses, such a finding is best left to the trial judge who accordingly is accorded great weight in the appellate court.

[32] Consequently, it is paramount and crucial that we remind ourselves that, as the appellate court, we do not intervene on findings of fact as that is the primary function of the trial judge who is best placed and equipped to assess that decision. The trial judge would have had an opportunity to evaluate the demeanour of the witness in order to draw some conclusions on the credibility of that witness. However, that evaluation of issues, claims, defences as well as counterclaims, must be conducted properly, holistically and not compartmentalised, looking at all the circumstances and in accordance with the applicable legal principles and the law of evidence. There must also be consistency in conclusions reached. Where that evaluation is not full or adequate and where it has not been considered or tested against the weight of all other evidence properly placed before the court, particularly contemporaneous documentary evidence, such finding can no longer be said to be safe or one which a reasonable judge could have reached. In such a situation

where the trial court is plainly wrong in its apprehension of the law and the facts, where there has been no or insufficient judicial appreciation of the evidence, or where the acceptance or rejection of the evidence is not founded on good reasons, the appellate court must intervene lest a miscarriage of justice is occasioned. This was reminded by the Federal Court in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229:

> Nevertheless the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witnesses and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity ...

[33] In the present appeals, we are convinced and satisfied that with respect, the findings of the learned JC were clearly erroneous as they show a 'demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence'.

[34] The learned JC had held that in order to avail themselves to the remedy of specific performance, the appellants needed to prove their claims. In the understanding of the learned JC, that meant that the appellants had to prove that they had performed their end of the bargain under the SPAs and that they were now ready, able and willing to complete the SPAs. In order to do that, the learned JC held that the appellants must prove that they had paid the purchase price. Otherwise, they would not be entitled to the remedy of specific performance.

[35] With respect to the learned JC, although that may be the general principle, it would however, depend on the pleaded case and what the particular issues were. It is not in every case that the obligation to pay is under challenge. It may well be some other challenge and this was precisely the case here. A careful examination of the pleadings will bear this out.

[36] In the respective statements of claim, the appellants were seeking an order of specific performance, that the respondent do complete the SPAs and transfer the titles that had since been issued. In order to entitle them to that remedy, the appellants needed to prove the existence of the SPAs, the material terms and conditions of the SPAs that were relied on, the particular breach and

that they were ready, able and willing to perform the SPAs. The burden of proof was undoubtedly upon the appellants to prove that there was a breach of the SPAs when the respondent failed to effect title transfer and registration of title to the relevant properties to the appellants. Now, the respondent's pleaded defence to that claim is interesting and it merits closer examination.

[37] In respect of the claim of breach of its obligation to transfer title, the respondent denies the breach and at paras 3–4, 4A, 7–8, 10, 17 and 21–22 of the defence and counterclaim as well as the evidence of Nor Azmi bin Mat Ludin (DW2), the respondent's general manager at the material time, the respondent pleads that:

(a) the SPAs were not signed with its full knowledge;

(b) Lee had no authority, instruction or right to sign on behalf of the respondent;

(c) the appellants conspired with Lee to defraud the respondent;

(d) the appellants' lawyers were not on the respondent's panel of lawyers;

(e) the appellants were either known or related to Lee;

(f) Lee did not pay any of the purchase price into the respondent's account;

(g) the appellants were given the keys and vacant possession to the properties on 31 March 2006, before the SPAs were signed on 21 April 2006;

(h) the appellants paid the purchase prices on 3 March 2006 even before the SPAs were signed on 21 April 2006;

(i) the respondent did not receive any of the monies paid;

(j) the appellants did not pay the purchase monies;

(k) Lee had no authority, instruction or right to issue the Lee letters which letters were not in the interest of the respondent;

(l) Lee was in breach of his fiduciary duties with the respondent and that Lee had conspired with the appellants in signing the SPAs; and

(m) Lee had committed fraud on the respondent and the appellant was also involved in that fraud.

[38] Further along in its defence, the respondent denied the existence of any understanding between the parties and that keys to the relevant properties were handed over to the appellants even before the SPAs were signed before substantially repeating the above defence — see for instance paras 7, 8 and 12. At para 9, the respondent also pleads that Lee had concealed all information pertaining to the SPAs from the respondent's knowledge and that Lee had absconded with a substantial amount of the papers relating to the SPAs. At

para 22 of its amended defence and counterclaim, the respondent once again, inter alia, alleges that the appellants had failed to pay the purchase price.

[39] In the reply and defence to the counterclaim, the appellants asserted payments and relied on the letters issued by Lee confirming such payments and their occupation of the properties, amongst its evidence of payments. The appellants also, inter alia, alleged that the non-payment into the respondent's accounts and the matter of breach of fiduciary duties were internal matters which were of no concern to the appellants who had relied on the representations of Lee.

[40] From the pleadings, the defence and thereby the respondent's counterclaim can broadly be stated as:

(a) there is a conspiracy and fraud between the appellants and Lee to defraud the respondent and this can be gathered from the fact that they know each other, the solicitors used are not from its panel of lawyers and the monies were not paid into its accounts; and

(b) Lee is in breach of his fiduciary duties to the respondent when he entered the SPAs without the respondent's full knowledge and authorisation.

[41] From these pleadings, it is quite apparent that the respondent accepts the existence of the SPAs that was signed between the three parties. What it however, does not accept, is that the SPAs bind them, and its reasons can be reduced to the allegation that each of the appellants was in cohorts with their erstwhile managing director, Lee in depriving the respondent of the monies under the SPAs because Lee failed to pay the purchase monies into the respondent's accounts.

[42] On the matter of payment of the purchase price, these pleadings reveal several positions taken by the respondent inconsistent with each other. On the one hand, the respondent claimed that the monies were never paid, on the other hand, it claims that Lee never paid the monies into its account. Yet, another argument that the respondent ran was that the monies were paid even before the SPAs were inked. All these responses to the matter of payment of the purchase price were not pleas in the alternative. That being the case, all these arguments are evidently inconsistent and the respondent should never have been allowed to make the arguments in the first place. This state of the pleadings should have been properly dealt with at the material time or taken into consideration by the learned JC. As it was not, there is a serious misapprehension of the legal principles that caused a serious misdirection on the matter of proof of purchase price. This error in itself warrants appellate intervention.

[43] Be that as it may, on the requirement of proof of payment, each appellant testified that they had each fully paid in cash. They further testified on how the purchase monies were raise, the details of which are already set out earlier. The appellant in the first appeal testified as PW1 while the other appellants are as follow: Lim Chin Keong — PW2; Lim Wang Ling — PW3; and Yong Heng Wah — PW4.

[44] After evaluating the credibility and veracity of the testimonies of each appellant and after taking 'the evidence as a whole', the learned JC was not satisfied that each of the appellants had paid the respondent. The trial court found that the appellants 'were not able to adduce independent documentary evidence to corroborate the fact that payment had been made as claimed, or even to show the sources from which the plaintiff had raised the purchase price in each case. This combined with the fact that the plaintiffs had claimed that payment had been made entirely in physical bank notes, meant that none of the plaintiffs were able to establish that, on a balance of probabilities, payment of the purchase price had in fact been made'. The learned JC required evidence of withdrawals of money from bank accounts in the form of bank statements, cheque images, bank-in slips or other form of documentary record, whether for the initial soft loans from friends or family members or the repayments to these same persons, to be produced. Specifically, the trial court found that PW1, PW2 and PW3 did not tender evidence of repayments through the proceeds of the loans from Hong Leong Bank. None of persons who had provided the soft loans were also called to testify for any of the appellants. In short, the learned JC simply did not believe the appellants.

[45] Although the learned JC said that he had evaluated the credibility and veracity of the testimonies of each appellant and had taken 'the evidence as a whole', His Lordship did not explain why he found their evidence wanting, why he disbelieved them and why he needed the oral evidence corroborated, save for PW1 and PW4. PW1 had testified that at the material time, he had invested in properties as a business. PW1 bought, sold and let out properties. Although PW1 had acknowledged that it was not a norm for a seller to require payment in physical notes, PW1 testified that he had had no reservations in paying cash for the purchase. The learned JC found this answer 'disingenuous and self-contradicting'. PW4 had also made several other purchases prior to the property in question. Like PW1, he did not consider the request to pay in cash unusual. However, PW1 told the court that he had checked with his lawyer on whether it was safe to make such payment before he paid. The learned JC found this answer also inherently contradictory. According to the learned JC, 'if he had not considered it unusual for the developer to request for payment in case, then why did he check with his lawyer?'. No reasons were offered as to why the testimonies of the other two appellants, that they had paid in full and with cash, were rejected. Since these are for all intents and purposes four separate

trials, the learned JC ought to have also evaluated the evidence of PW2 and PW3 and explained why their oral evidence was rejected or was insufficient such that corroborative evidence was required. He did not. The learned JC was not at liberty and neither can we infer that what was determined in relation to PW1 and PW4 was necessarily the position with PW2 and PW3. That is precisely the purpose of the trial and the function of the trial judge; to hear and evaluate the evidence. The learned JC must give reasons as to why he has rejected or doubted the oral testimonies of these two appellants. Surely it cannot be the case that every oral testimony must be corroborated by documentary evidence although the presence of credible contemporaneous documentary evidence will undoubtedly corroborate and strengthen the truth of the oral testimony. It all depends.

[46] From the records of appeal, it appears that the learned JC had difficulty accepting that the appellants paid in cash. This is evident from the notes of proceedings in relation to the testimonies of the four appellants where the learned JC wanted to know the meaning of 'cash', whether it meant 'physical notes' or 'wang kertas', the denominations of the cash, how the cash was conveyed and the dimensions of the bags or suitcases which carried such cash — see for instance pp 114–117 in relation to PW1; pp 233, 237–241 in relation to PW2; at p 336 in relation to PW3; and at p 424 in respect of PW4.

[47] It is further evident from the grounds of judgment that the learned JC was extremely sceptical about the cash terms of the sales. At para 39, His Lordship said that '… it would not have been entirely unusual for property purchases to be funded from retained earnings or savings, but it would have been unusual for a developer to insist on payment being made in physical notes, given the additional steps that would have to be taken to assure the safety and security of a large amount of cash'. The learned JC also rejected the appellants' claim that they had paid '… upfront, and even before the SPAs had been signed by the third counterparty to the agreements, DBKL'. finding such action on the part of the appellants '… demonstrated a cavalier lack of caution on their part'.

[48] We have poured over the records of appeal and we do not find any contention that Lee had insisted on cash payments. What each appellant had testified was that the purchase price of the properties as appearing in the SPAs were actually the discounted prices offered by Lee in the event the appellants paid in cash. Otherwise, the price would have been at least 10% more. It was open to the appellants, as purchasers to consider whether to take up the offer of discount. Where the offer was accepted, it was then up to each appellant to decide how they were to meet those cash terms. This is entirely different from the erroneous understanding of the learned JC, that the respondent or Lee had insisted on payment in cash. There was actually no such contention. Each

appellant had also testified that he did not find it unusual for an offer of discount to be made if the payment was in cash. There was no evidence from the respondent to suggest that the prices mentioned in the SPAs were wrong, that such prices could not have been the discounted but the original prices, or that discounts were never ever given in the industry. In the absence of any evidence to the contrary, the contention of the appellants that Lee had offered a discount must necessarily stand.

[49] From the record, it was also the trial court itself that had misapprehended the cash payments to be necessarily in physical notes, and that this did not sound plausible as 'additional steps that would have to be taken to assure the safety and security of a large amount of cash'. With respect to the learned JC, there was not only undue emphasis on the mode of the cash payment but also no basis for rejecting the oral testimonies of the appellants that they had fully paid the purchase price in cash. There was no suggestion that the appellants were persons who were not capable of financing such purchases; and the appellants have in any event testified in detail as to how the total sums were raised.

[50] The non-production of bank statements or any records was also adequately explained — 'hal ini sudah lama dan saya tidak simpan statement-statement tersebut'; and the appellants were each relying on the Lee letters. It is not appropriate to evaluate the testimonies and evidence presented with the benefit of hindsight; the evidence must be tested for their veracity as at the relevant time, pitched against certain critical facts. The purchases were made in 2006 with the appellants almost immediately been given possession and occupation. The appellants occupied and appear to continue occupying the properties until the matter of title was taken to court. At no time were any of the appellants evicted by virtue of the position taken by the respondent; that there were no sales. If indeed that was the position, there is no explanation forthcoming as to why the respondent never evicted any of the appellants. Instead, the respondent only acted when the appellants sued; and the matter of vacant possession was taken up as a counterclaim.

[51] What was critically not evaluated by the learned JC is the common reason behind the payment in cash. Lee was giving a 10% discount on the properties provided that the purchase price was paid in cash. The fact and the existence of discounts are not in dispute. These were not situations where payments in cash were made for no rhyme or reason; the appellants paid in cash so that they could each purchase the property on a discounted price. After all, as explained by PW1 at p 130 of the record of appeal, that was precisely what he wanted to do with his cash when cross-examined on why he did not insist on paying by cheque or bank draft:

Pada masa itu saya tidak berfikir banyak, dia cakap nak bayar wang tunai saya bayar

saja. Inilah kita deal business. Kalau wang tunai tak boleh buat business then buat apa nak wang tunai?

...

Maksud saya kalau wang tunai tak boleh digunakan untuk membeli barang, then buat apa gunanya nak wang tunai.

Mengikut perjanjian kita dia memberi diskaun sebanyak 10% kepada saya dan saya perlu membayar secara wang tunai.

[52] Finally, we note that the learned JC had accepted the evidence of the respondent's witnesses that because the monies were not banked into the respondent's accounts, the appellants had not paid the purchase prices under the SPAs — see para 36. In this regard, we cannot see how the matter of banking in or otherwise is relevant to the issue of payment. No purchaser or party dealing with a developer such as the respondent can be made responsible for ensuring that purchase monies are paid into the respondent's accounts and that failure to show such payment is evidence of non-payment. These are clearly matters beyond the normal course of doing business. We therefore do not find any basis for the learned JC to reject the oral evidence of the appellants and to insist on corroborative evidence.

[53] We further disagree with the learned JC's findings that the claims were not proved for want of corroborative documentary evidence. His Lordship was not inclined to allow the appellants to rely on the Lee letters as evidence corroborating the fact of payments by the appellants because these letters were all written by Lee, the person against whom the respondent had alleged fraud, and the person with whom the appellants are said to be complicit with in defrauding the respondent. Hence, these letters were said to be of limited value. The learned JC was also disinclined to allow the appellants to rely on the rule in *Turquand*'s case and the principle of ostensible authority finding that the circumstances of the case were such that the appellants had been put on inquiry. When they failed to make such reasonable inquiries, it was no longer open to them to rely on those letters.

[54] We are reminded that in the first of the three letters, that is the letter dated 3 March 2006 addressed to each appellant, payment of the purchase price was confirmed; in the second letter dated 31 March 2006 also addressed to each appellant, it was recorded that keys to the relevant properties had been delivered to the relevant appellant; and the third letter dated 30 July 2006 addressed to Messrs Yee How & Tan confirmed that full payment of the purchase price had been paid. These three letters have been collectively referred to as the 'Lee letters'.

[55] As far as the admission of the three letters signed by Lee are concerned,

we find that the learned JC had properly admitted all three letters in evidence. The respondent had challenged the admissibility of these letters on the basis that their maker, Lee, was not called to testify. Their challenge was overruled. The learned JC found that s 32(1)(b) and the proviso to s 73A of the Evidence Act 1950 apply since it was not in dispute that Lee could not be found, and that these letters were relevant as these letters 'appear to have been made in the ordinary course of business'. We cannot fault that reasoning. Both sections do indeed create exceptions to the rule against hearsay and the general rule that best evidence must be adduced to prove or disprove, as the case may be.

[56] Despite admitting these Lee letters, the learned JC did not accept what was stated in them. The court found the evidentiary value of the Lee letters to be also 'limited, as it was signed by the person against whom the defendant alleged fraud'. The court doubted the truth and probative value of their contents and required thereby corroborative proof of payments by the appellants.

[57] It is clear from this that what had inhibited the court from accepting the Lee letters in the full sense of its evidentiary value was the fact that they were written by Lee, the person against whom the respondent had alleged fraud. With respect to the learned JC, not only was it erroneous to exclude the Lee letters for reasons that will become clearer, the learned JC fell into error in finally not evaluating the Lee letters at all, even in the limited or restricted circumstances that the court said was available to the appellants. In this respect, we return to the learned JC's findings on the counterclaim and on the defence of conspiracy and fraud.

[58] Both defences and allegations of conspiracy and fraud on the part of the appellants were dismissed. The learned JC recognised that the respondent's case 'pivoted upon the fact that it did not have any record of any of the SPAs nor of any payment being made by the plaintiffs to the defendant', but according to the learned JC, 'the absence of such records cannot amount to proof of fraud, even bearing in mind that the standard of proof needed to be discharged for fraud in civil cases is on a balance of probabilities …'. This was the civil burden of probabilities. The court found that although the appellants had failed to show that payments had been made, it 'does not necessarily follow that the plaintiffs had knowingly assisted and colluded to cheat the defendant and to secure the relevant properties in an unlawful manner'. It was the finding of the learned JC that the 'existence of such an understanding between Lee Chee Thing and each of the plaintiffs for payment to be made in cash and for an acknowledgment of payment to be given by the former as a record of payment of the purchase price … cannot amount to proof that the plaintiffs had colluded with Lee Chee Thing to cheat or defraud the defendant.

[59] There is no appeal or cross-appeal before us against that decision. The effect of this finding is that there is no conspiracy or fraud as alleged. That consequently leaves only one defence which is that Lee was in breach of his fiduciary duties to the respondent when he entered the SPAs without the respondent's full knowledge and authorisation. Given that the defence and the counterclaim are mirror pleas of each other, this finding that there was no conspiracy and no fraud committed by any of the appellants has actually real and direct ramifications to the rest of the case which with respect, was overlooked by the trial court.

[60] What the learned JC had failed to appreciate was that when the defences were rejected, the restrain that the learned JC had imposed on himself was actually no longer applicable. The theory of conspiracy and fraud fell when the respondent failed to prove its allegations. The respondent cannot possibly maintain its claim of conspiracy anymore as a defence to the appellants' claim, at least one involving Lee. It would be inconsistent to say on the one hand that there was no conspiracy or fraud by the appellants and on the other, say that the appellants still cannot rely on the letters because they were written by the co-conspirator. Once the theory of conspiracy was rejected, there was no issue of co-conspirator anymore to weigh against any reliance on the Lee letters. This aspect and holistic evaluation of the evidence and the whole claim and counterclaim was overlooked by the learned JC. Consequently, the learned judge was erroneous in finding the Lee letters to be of limited evidentiary value. The appellants were entitled to rely on the Lee letters as evidence of their claim and the learned JC ought to have examined the contents of those letters and evaluate them against any other evidence before the court. Had the court done that, it would have found that the appellants' claims were consistent and satisfactorily proved on a balance of probabilities.

[61] We further find the rejection of the appellants' reliance on the Lee letters erroneous because there was no suggestion that these letters written on the respondent's letter head were forged. The genuineness of the letters was never in doubt. Neither was it in question. Bearing in mind that these letters were properly admitted under ss 32(1)(b) and 73A(1)(a)(i) of the Evidence Act 1950, it must be appreciated that this infers that Lee's statements in those letters were 'acknowledgement written or signed by him of the receipt of money' in the ordinary course of business of the defendant; and that Lee made these statements with personal knowledge. It is then difficult to see how the learned JC could be justified in law and on the facts in rejecting the contents of any of the three letters.

[62] We further find ourselves unable to agree with the learned JC that the appellants had been put on inquiry in the circumstances of the case such that the appellants are not able to rely on the representations of Lee and the letters

written by Lee on behalf of the respondent. It was the learned JC's findings that the appellants were put on inquiry for the reason already alluded to earlier, that it was because it was 'unusual for a developer to insist on payment being made in physical notes'. The learned JC found that '... the fact that Lee Chee Thing had asked for payment to be made in physical notes would have put each of the plaintiffs on a duty to make further inquiries, which in turn would vitiate the operation of any representation so as to give rise to any ostensible authority on the part of Lee Chee Thing to bind the defendant. Their failure to make any further inquiries meant that the acts of Lee Chee Thing in accepting payment and issuing receipts therefore would not operate to bind the defendant as principal'.

[63] We have already pointed out that there was no such insistence in the first place. Further, the payment in cash was to allow for a discount. As expressed earlier, there was nothing usual in such an offer. Even the respondent is not suggesting that there is no such practice. In a separate claim along similar facts where the whole transaction was conducted on cash terms, the respondent has seen fit to honour the deal, see the case of *Liew Muy Yan v Fadason Holdings Sdn Bhd* Civil Suit No S-22NCVC-16 of 2011 (unreported)). Liew stays at No 2 Jalan 8/7, Off Jalan Kepong whereas the other appellants stay at Nos 1, 21, 22 and 24. Like the present appellants, Liew paid the purchase price of RM836,614 in cash. Liew's contract was honoured although the cash never found its way into the respondent's accounts (respondent's pleaded defence in that case). Bearing in mind that one of the defences raised by the respondent was its lack of records as Lee had absconded with a substantial amount of them, the court should not have disbelieved the appellant's claim of payment in cash terms.

[64] Such discount may be described as attractive as it brings a savings of at least 10%, depending on the discount. We cannot see why the fact that one of the appellants (PW4) checked with his lawyers before proceeding with the deal is said to be inherently contradictory and should be held against him. Therefore, we do not find any indication or fact so as to put any of the appellants on inquiry. On the contrary, it was reasonable for the appellants, none of whom knew each other at the material time, to rely on the representations of Lee and thereby the three letters that he wrote.

[65] The rationale and operation of the indoor management rule or more often known as the *rule in Turquand*'s case is clearly explained in the Federal Court's decision in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793. At p 826, Edgar Joseph Jr FCJ opined that the rule was intended to protect persons dealing with the company and not the company itself:

... the rule in *Royal British Bank v Turquand* (1855) 119 ER 474, which protect

A outsiders dealing with a company in good faith who are entitled to assume that acts within its constitution and powers have been properly performed, and are not bound to inquire whether acts of internal management have been regular ...

At this point, we would interpolate to observe that the effect of the rule in *Turquand*'s case is that it reduces the enquiries which outsiders having dealings with a company — or more correctly — outsiders who reasonably think they are having dealings with a company — must make, which, of course promotes business convenience. Such outsiders have no right to insist on proof by the company's directors that the provisions of its memorandum or articles have been complied with, and they cannot therefore be deemed to have constructive notice of some failure to comply which they have no means of discovering (*Gloucester County Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at p 636 per Lindley LJ) and it is this which provides the legal basis for the rule).

[66] The Federal Court however, reminded that the rule:

... cannot ..., be invoked by an outsider who knows or ought to know that there is an irregularity.

More particularly, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception ...

Furthermore, outsiders dealing with a company would also be affected by knowledge of facts which would put a reasonable person on enquiry; in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool), Limited v Barclays Bank, Limited* [1928] 1 KB 48 at p 56 Wright J (as he then was) said:

> Whatever may be the exact scope of the rule in Turquand's case I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied on by a person which has been put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar the person from relying on the prima facie presumption, then it is clear, I thing, that he cannot claim the benefit of the rule ...

[67] The Federal Court further elucidated on the kind of circumstances where an outsider is said to be put on inquiry so that the fine balance of business convenience 'between the competing interests of outsiders contracting with companies on the one hand and the innocent creditors and shareholders of companies on the other', may be maintained. These circumstances would include one where a doubt has arisen as to the authorisation of a representative of the company and that doubt can be easily clarified by doing a search with the Registry of Companies. Another would be

where 'the circumstances raised a doubt regarding a possible abuse of power'. In such a case, 'the purpose of inquiry is not to ascertain that the transaction is in fact regular but merely to negative or neutralise the circumstances of suspicion, the outsider is entitled to enforce the contract provided that he acts in good faith and without notice that the authority is being abused. It follows that reasonable explanation given by the agent in answer to inquiries would in such a case suffice (*AL Underwood, Ltd v Bank of Liverpool and Martins; Same v Barclays Bank* [1924] 1 KB 775)'.

[68] The Federal Court cautioned that:

> ... when there is doubt regarding the existence of power the outsider who is put upon inquiry cannot proceed until he has ascertained that actual authority exists or fresh material is disclosed upon which to base a claim for ostensible authority. In such a situation, assurances by an agent that he has authority will not suffice to found a plea of estoppel against the company. Consequently, reasonable explanations given by an agent will not help the outsider (see *AL Underwood Ltd v Bank of Liverpool*).
>
> The very nature of a proposed transaction may put a person on inquiry as to the authority of the directors to effect it even if he has no special relationship with the company, see *Rolled Steel Products (Holdings) Ltd v British Steel & Corp and others* [1986] Ch 246 at p 285). So, for example, in *Northside Development Pty Ltd v Registrar General & Ors* [1990] 170 CLR 146 (High Court Australia) the bank was put on inquiry because there was a pledging off an asset by a company for no known or likely commercial reason, and for the known purpose of benefiting someone else, in particular, to secure an advance to a third party without any indication that the advance was for the purpose of the company's business. Accordingly, it was held that the rule in *Turquand*'s case did not prevent the company from relying on the fact that the mortgage was executed without its authority.

[69] The material time 'at which there must be knowledge or the means of knowledge is the time of the entry into the transaction' — see *Kanssen v Rialto (West End) Ltd* [1944] Ch 346; *Morris v Kanssen* [1946] AC 459. Whether or not the outsider such as the appellants are put on notice is very much a question of fact.

[70] The rule in *Turquand*'s case affords therefore, a presumptive protection to the appellants, that they are entitled to rely on the acts, decisions, representations and conduct of the respondent's representative, Lee when they entered into the SPAs. This protection is lost if it can be shown that the circumstances of the transaction are such as to put the appellants on inquiry. As already pointed out earlier, the respondent in its defence and counterclaim had substantially relied on fraud and conspiracy between the appellants and Lee; that Lee had breached his fiduciary duties with the respondent; and that the SPAs and letters were written by Lee without the respondent's knowledge, that Lee had acted without authorisation, power or right to do so. To this, the

appellants had relied on the Lee letters and the rule in *Turquand*'s case.

[71] What is interesting is the respondent's reply; it cites fraud discovered after the change of management. There are no pleas to the effect that the appellants are not entitled to rely on the presumption of proper cloaking of Lee with the necessary authorisation and mandates because the appellants have been put on inquiry. Since the determination of the application of this principle is one of fact, there ought to have been facts pleaded for which evidence is then led to establish that allegation. The burden would be on the respondent to show that the appellants are not entitled to rely on the rule in *Turquand*'s case because the appellants have been put on inquiry by certain circumstances. There were no such pleas. Not even that which troubled the learned JC; which is that of the matter of insisting on payment in physical notes. We cannot see how the selling of the properties and the subsequent entry into the SPAs are transactions which by their very nature would put any of the appellants on inquiry. In fact, we are reminded that it is not the respondent's case that Lee had no mandate to give discounts; the defence is that Lee had no necessary mandates and the respondent had no knowledge of the SPAs.

[72] To this, we say that the respondent is a developer, and its very business is to sell the properties developed in Taman Fadason. We fail to see how the SPAs are not normal transactions ordinarily entered into in the course of the very business of the respondent. The involvement of Lee, a director and a managing director to boot cannot and does not alter the fact that the SPAs are by their very nature normal and ordinary transactions and business conducted by a company such as the respondent. There was nothing to put any of the appellants on inquiry.

[73] It is without doubt that Lee was the managing director of the respondent at the material time. It would be safe to say that a managing director is generally authorised to transact the sales of properties on behalf of the respondent including entering and signing on behalf of the respondent such SPAs as those produced and admitted at trial. In fact, the authenticity and truth of the contents of all the SPAs are not challenged. The SPAs were genuine agreements to sell the properties to the appellants. What was disputed was simply the matter of payments. The respondent could not trace any appellant's payments in their records, and for that reason say that the appellants have conspired with Lee to defraud the respondent. With these circumstances, we fully agree with the appellants that the learned JC was clearly erroneous when finding that the appellants were not entitled to rely on the rule in *Turquand*'s case. The appellants were perfectly entitled to rely on the real and ostensible authority of Lee as the SPAs were valid and enforceable. Consequently, the Lee letters are rightly evidence that the appellants could rely on to prove each of their claims.

[74] We pause to add that when the learned JC said that because he had found the SPAs unenforceable 'it did not matter whether the SPAs had been effectively terminated by the 10 July 2009 letter'. In the first place, termination cannot arise if there are no SPAs to begin with. Hence, the defendant's own act of termination amounts to an acknowledgment of the SPAs. Furthermore, since we have found the learned JC's decision on the enforceability of the SPAs to be erroneous, the issue of the defendant's termination becomes relevant. In this regard, the learned JC had said that 'in any event, on the facts, I find that the defendant has not satisfied me that there was an effective notice of the purported termination'. With this express finding by the learned judge that the terminations were not effective, and there is no appeal by the defendant on this finding, the SPAs remain valid and must be performed by the defendant.

[75] Over and above the reasons already set out, we are convinced that appellate intervention is warranted in these appeals. Contrary to what the learned JC said, that he had evaluated the evidence as a whole, with respect, we find that there is in fact, a failure to do so. The trial court had ignored quite a few other pieces of contemporaneous documentary evidence which are both material and corroborative of the appellants' claims. Had these evidence been taken into proper consideration, the learned JC would have been satisfied that the appellants' claims were proved. These include:

(a) the fact that the SPAs were signed not only by the disputing parties before the court but also by DBKL, the proprietor of the lands upon which the properties were built;

(b) that DBKL had also given its written consent to the assignment — see p 1162;

(c) the respondent's letter dated 12 February 2009 forwarding a photocopy of the relevant title deed was signed not by Lee but by its sales admin manager (Vivien Lee) — see p 1040;

(d) the appellants' complaints to the Ministry of Housing on 12 August 2009 over the respondent's refusal to transfer title as promised — see p 1174;

(e) the respondent's request to the Ministry for time to reply dated 21 January 2009 — see p 1178;

(f) the Ministry's reminder to the respondent dated 10 December 2009 which appears to have gone unanswered — see p 1179;

(g) the payment of assessment tax by the appellants — see p 1181;

(h) that Lee Chee Keong's unit was the show unit that he bought after viewing it;

(i) the third of the Lee's letters dated 30 July 2006 confirmed, inter alia, full payment and this letter was sent not to the appellants but to the appellants' solicitors ('PW6') and copied to the end financier, Hong Leong Bank and the appellants — see evidence of bank officer, Woon Guek Pong ('PW5');

(j) the fact that term loans were granted on the strength of the Lee letters; and

(k) the correspondence with PW6, the solicitors involved in the SPAs which clearly show that the payments had been made in full.

[76] The respondent's explanation and conduct after it learnt of Lee's misdeeds also does not hold water that conduct is relevant and material to the integrity of the defence pleaded. Lee was removed as managing director in 2009. Yet, nothing was done in relation to the properties sold. The respondent did not do anything until the appellants filed their suits seeking specific performance of the SPAs. Surely if the respondent's defence was to be believed, there must be evidence of some action of recovery on their part. The records of appeal show that as late as 2009, the respondent was corresponding with the appellants' solicitors on the matter of the issue of title.

[77] Finally, on the relief ordered. The learned JC found the counterclaim not proved, even on a standard of balance of probabilities. However, the trial court ordered for vacant possession of the subject properties to be redelivered by each of the appellants to the respondent within 30 days of the order as a 'natural consequence of the dismissal of the plaintiffs' actions, that none of them have any right to possession of the subject properties'. We are constrained to put right these orders.

[78] The SPAs are tripartite agreements with DBKL as the proprietor of the lands upon which the properties are built. The authenticity and authorisation of signatories signing on behalf of DBKL was never an issue in the case. The issue was necessarily one of performance and completion of the SPAs, and not, the validity of the SPAs. That being so, we are of the considered view that the High Court erred in ordering that the properties be return to the respondent. This was not the appropriate order even if the court was inclined to dismiss both the claims and counterclaims, which it ultimately did. What the court ought to have done in those circumstances was to order payment of the purchase price, as prayed by the respondent. Aside from the fact that the appellants have been in occupation of their respective properties since the time of purchase during which time defects have been identified and attended to by the respondent, there were material facts which were not considered at all by the learned JC including the conduct of the respondent further behoves this as the most appropriate order.

[79] In this regard, the respondent's response following its own internal investigations confirms this conclusion. The respondent dismissed Lee on 26 June 2007, but it only got round to lodging police reports against Lee some two years later, on 17 April 2009, 6 August 2009 and 28 August 2009. As for the SPAs, the respondent only got round to unilaterally terminating them on 10 July 2009. In fact, the respondent did not report its concerns on the payments by the appellants for another year: see further police reports lodged on 30 August 2010 and 18 January 2011 concerning the payments. Thereafter, the respondent did nothing towards recovering the properties until the appellants filed their respective claims on 21 September 2012. It was only at that point that the respondent counterclaimed for a return of the properties or for payments of the purchases under the SPAs. All this as well as the conduct of the respondent are relevant and material considerations which must be evaluated by the trial judge, particularly when determining the appropriate remedy to grant. The unexplained and non-consideration of these factors render the decision reached liable to be overturned which is why we have intervened.

CONCLUSION

[80] For all the reasons set out above, the decision of the learned JC is flawed and liable to be set aside. The totality of evidence, both oral and documentary overwhelmingly establish each of the appellants' claims. The appeals are therefore allowed with costs and the decisions of the learned JC are hereby set aside.

Appeals allowed.

Reported by Ashok Kumar